THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable

CASE NO: 232/07

In the matter between :

JACOB GEDLEYIHLEKISA ZUMA	First Appellant
THINT HOLDINGS (SOUTHERN AFRICA) (PTY) LTD	Second Appellant
THINT (PTY) LTD	Third Appellant

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Respondent

Before:	**FARLAM, NUGENT, CLOETE, PONNAN & MLAMBO JJA**
Heard:	**21 SEPTEMBER 2007**
Delivered:	**8 NOVEMBER 2007**
Summary:	**Letter of request issued under s 2(2) of the International Co-operation in Criminal Matters Act 1996 – whether provisions of the section complied with – whether appellants have standing to challenge the validity of the request.**
Neutral citation:	**This judgment may be referred to as *J G Zuma v NDPP* [2007] SCA 135 (RSA)**

NUGENT JA

NUGENT JA:

[1] On 2 April 2007 the Deputy Judge President of the High Court at Durban (Levinsohn DJP) issued a letter requesting the Attorney-General of the Republic of Mauritius to transmit to the Republic of South Africa fourteen documents[1] that are in the possession of the authorities in Mauritius and to obtain and to transmit statements as to their authenticity. In doing so the learned judge purported to exercise the authority that is conferred upon a judge in chambers or a magistrate by s 2(2) of the International Co-operation in Criminal Matters Act No. 75 of 1996. The letter of request was issued at the instance of the Directorate of Special Operations (a division of the office of the National Director of Public Prosecutions). The documents and authenticating statements are said by the Directorate to be required as evidence in any prosecution of the appellants that might occur. The appellants say that Levinsohn DJP ought not to have issued the letter of request and they now appeal, with the leave of the learned judge, against his decision to do so.

[2] The decision to issue the request has generated a record of fourteen volumes and voluminous heads of argument. That impressive volume of paper ought not to obscure what is in issue. The learned judge has done no more than place a judicial imprimatur upon a request to the Attorney-General of Mauritius to provide assistance for a possible prosecution. His decision has not compromised or even affected any rights of the appellants. It was submitted on behalf of the appellants that their 'fair trial rights' (the right of every accused person to a fair trial that is protected by s 35(3) of the Bill of Rights) have in some way been compromised but that is not correct. Their right to be tried

[1] At times the record refers to thirteen documents but the discrepancy is not material for present purposes.

fairly, if they are tried at all, is unaffected by the issue of the letter of request, and will remain unaffected even if the request is acceded to. It is no doubt so, as submitted on their behalf, that the evidence that is sought to be obtained by the letter of request might result in or contribute to their conviction, but it will do so only if it is admitted at a trial, and their right to object to the admission of the evidence, on any ground that might properly be available to them, remains intact. Finally, it was submitted that the decision to issue the letter of request has compromised the appellants' right not to have such a request issued, but that begs the question whether they have such a right at all and I will return to that later in this judgment. But before doing so I will set out briefly the circumstances in which the letter of request came to be issued and deal with the grounds upon which it was submitted that Levinsohn DJP erred in issuing it.

[3] The documents that are sought by the NDPP are at present in the possession of a body in Mauritius known as the Independent Commission Against Corruption (ICAC). They came into the possession of the ICAC in consequence of an order that was made by the Supreme Court of Mauritius on 5 October 2001. The order authorised the Director of the Economic Crime Office of that country (the Director) to enter, amongst others, the premises of a company known as Thales International Africa Ltd (formerly Thompson-CSF Africa Ltd) and those of one of its officers, Mr Alain Thetard, and to search for and remove documents of the kind specified in the order. The order was applied for by the Director at the request of the Directorate of Special Operations.

[4] An official in the office of the National Director of Public Prosecutions (the NDPP), Mr Downer SC, was present at the time the order of the Supreme Court of Mauritius was executed. Mr Downer was given copies of the fourteen

documents that are now in issue and the originals were retained by the Director. (The Economic Crime Office in Mauritius has since been abolished and has been succeeded by the ICAC.)

[5] About a week after the order was executed Thales International Africa Ltd and Mr Thetard (and another company whose involvement in the matter has become immaterial) launched proceedings in the Supreme Court of Mauritius for, amongst other things, orders restricting the use that could be made of the documents that had been seized. The application culminated in an undertaking being given by the ICAC (recorded by the Supreme Court on 27 March 2003) not to communicate any of the documents to any person or authority unless it was authorised to do so by order of a court in Mauritius. (The other terms of the agreement are not now material.)

[6] During June 2005 the first appellant (Mr Zuma) was indicted on charges of corruption, and in November 2005 the second and third appellants (Thint Holdings and Thint respectively) were similarly indicted. They were called upon to answer to the charges in the High Court at Durban on 31 July 2006.

[7] On 7 December 2005 the NDPP sought to secure possession of the original documents (and authenticating evidence) that are now in issue for use as evidence in the impending trial by invoking the provisions of s 2(1) of the Act.[2] That section permits 'a court or the officer presiding at proceedings', in prescribed circumstances, to issue a letter of request for assistance from a foreign

[2] Section 2(1): 'If it appears to a court or to the officer presiding at proceedings that the examination at such proceedings of a person who is in a foreign State, is necessary in the interests of justice and that the attendance of such person cannot be obtained without undue delay, expense or inconvenience, the court or such presiding officer may issue a letter of request in which assistance from that foreign State is sought to obtain such evidence as is stated in the letter of request for use at such proceedings.'

state to obtain 'such evidence as is stated in the letter of request for use at such proceedings'. On 22 March 2006 Combrinck J refused to issue the request on the grounds that s 2(1) conferred authority only upon a court that was seized of criminal proceedings and the application was postponed to be heard by the court that was scheduled to try the appellants.

[8] On the day that the trial of the appellants was due to commence the prosecution applied for the trial to be postponed. The application was argued before Msimang J and on 20 September 2006 the learned judge ordered that the postponement be refused and he struck the matter from the roll.

[9] The NDPP then brought the application that is the subject of this appeal (it was lodged on 4 December 2006) in reliance upon the provisions of s 2(2) of the Act. That section authorises a judge in chambers, or a magistrate, upon application to him or her, to issue a letter of request in which assistance from a foreign state is sought 'to obtain such information as is stated in the letter of request for use in an investigation related to an alleged offence' if he or she is satisfied

'(a) that there are reasonable grounds for believing that an offence has been committed in the Republic or that it is necessary to determine whether an offence has been committed;

(b) that an investigation in respect thereof is being conducted; and

(c) that for purposes of the investigation it is necessary in the interests of justice that information be obtained from a person or authority in a foreign State.'

Although the Act permits such an application to be brought ex parte the NDPP served a copy on the appellants in accordance with an earlier agreement to do so. Answering and replying affidavits were filed and the application was considered

by Levinsohn DJP in open court on 22 March 2007. The learned judge issued the letter of request on 2 April 2007.

[10] It was submitted on behalf of the appellants that because they were indicted, and the indictments have not been withdrawn, 'proceedings' as contemplated by s 2(1) continued against them at the time the application was considered by Levinsohn DJP, with the result that he was not authorised to exercise the authority that is conferred by s 2(2). I do not think that is correct. The word 'proceedings' might have various meanings depending upon its context. It is clear that it is used in s 2(1) to mean the trial of a person on a criminal charge,[3] which commences when the person who stands accused is called upon to plead to the charge. That construction seems to me to accord with the ordinary meaning of the term in the context in which it is used, and is fortified by the provisions of s 3(1), s 3(3)(a) and (b), s 5(4) and s 6, all of which contemplate evidence being placed before a court after issue has been joined. The clear distinction between the two sections is that s 2(1) allows for evidence to be taken in a foreign state in the course of a trial, while s 2(2) allows for assistance to be sought in the course of a criminal investigation that precedes a prosecution. Notwithstanding that the appellants have been indicted a trial on the charges has yet to commence (it was struck from the roll before the appellants were called upon to plead) and it was competent for Levinsohn DJP to exercise the authority that is conferred by s 2(2).

[11] The further submissions that were pressed before us by the appellants are interrelated. They all arise from the purpose for which the documents are

[3] 'Proceedings' are defined in s 1 of the Act to mean 'criminal proceedings and any other proceedings before a court or other tribunal, instituted for the purpose of determining whether any act or omission or conduct involves or amounts to an offence by any person.'

sought. I have already pointed out that the NDPP is well aware of what the documents contain and is in possession of copies. (Copies were given to Mr Downer in Mauritius immediately after they were seized.) The appellants have already intimated to the NDPP that if they are ever brought to trial they will object to the introduction into evidence of copies of the documents. The sole purpose for which the NDPP now requires the originals of the documents is to overcome such an objection by proffering the original documents as evidence in the possible trial.

[12] It was submitted on behalf of the appellants that s 2(2) of the Act is not available to obtain assistance for the purpose of securing evidence for a prosecution. It was submitted that s 2(2) permits assistance to be sought only where it is 'necessary' to do so in order to obtain 'information' for purposes of an 'investigation' into possible criminal conduct. Such an investigation, so it was submitted, is confined to making enquiries to determine whether an offence has been committed, from which it follows that the 'information' that might be sought is confined to knowledge that is as yet unknown to the investigator. Once it has been established that an offence has been committed, so the submission went, the authority that is conferred by s 2(2) to obtain assistance comes to an end. Any further assistance that might be required to secure evidence for production in a prosecution that might follow may only be sought under the provisions of s 2(1). What was sought in the present case, so it was submitted, was not 'information' in the sense that I have described, and the purpose for which the documents were sought cannot be said to have been 'necessary' for the purpose of an 'investigation' of that kind.

[13] I think that is an unduly narrow construction of the section. I have already said that the provisions of s 2(1) are designed to enable a court before which an accused person is being prosecuted, or the presiding officer at such a trial, to have evidence placed before it that is obtainable only in a foreign state. The construction that the appellants place on s 2(2) would mean that once a criminal investigation has established that an offence has been committed, evidence in a foreign state to prove the commission of the offence may only be secured by the prosecution after a trial has commenced. In my view that would be an absurd result that could not have been intended by the legislature.

[14] A criminal investigation, in ordinary language, is conducted not only to inform the investigator whether an offence was committed, but also to gather evidence that will prove its commission in due course. I see no reason to give the word the restricted meaning that is contended for by the appellants. I think it follows that the word 'information' is similarly not confined to knowledge of whether an offence was committed, and least of all to knowledge that is as yet unknown, but extends to known facts recorded in documentary form that might provide evidence of the commission of the offence. That construction is supported by the provisions of s 5(2), which contemplates a request for assistance yielding evidence that might be admissible in subsequent criminal proceedings.[4] In my view what is required to be shown under s 2(2) is only that a criminal investigation (which includes the gathering of evidence for a prosecution) is underway and that it is necessary to elicit the assistance of a foreign state to obtain information (which includes known facts in documentary form) for purposes of that criminal investigation. In my view the section plainly permitted assistance to be sought to obtain possession of the documents and

[4] 'Evidence' is defined in s 1 to include 'all books, documents and objects produced by a witness'.

authenticating statements that are now in issue and Levinsohn DJP cannot be faulted for having issued the letter of request.

[15] But the matter does not end there. I pointed out earlier in this judgment that the issuing of the letter of request was not definitive or dispositive of any rights of the appellants. That naturally raised the question whether the decision of Levinsohn DJP was even appealable,[5] but I think the matter goes even further. It is true, as counsel for the appellants reminded us, that the rule of law and the principle of legality requires state conduct (which includes the conduct of a judge) to be in accordance with law, but it does not follow that it might be challenged when rights are not affected by the conduct. The courts do not generally concern themselves with academic or abstract questions of law.

[16] Numerous cases have considered in what circumstances a person might be entitled to initiate, or intervene, in legal proceedings that are aimed at vindicating rights, some of which were referred to in support of the submission that the appellants had standing to challenge the validity of the decision to issue the letter of request. I do not think those cases are of assistance. All those cases were concerned, in one form or another, with proceedings to vindicate rights. The question in each case was whether the person concerned had sufficient interest in the vindication of the rights that were in issue to entitle him or her to initiate or intervene in the proceedings. Thus there is a line of cases in which decisions impacting upon the rights of the public at large were sought to be impugned,

[5] See the general rule in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) 532J-533A, which has been applied by this court on numerous occasions (for example, *Wallach v Lew Geffen Estates CC* 1993 (3) SA 258 (A) 263F-G; *Trope v South African Reserve Bank* 1993 (3) SA 264 (A) 267D-G) with limited exceptions (*Moch v Nedbank Travel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) 10E-H; *Phillips v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) paras 19 and 23). Counsel for the appellants relied particularly on *Beinash v Wixley* 1997 (3) SA 721 (SCA) 729J-730B but that applies to when and not whether a decision may be brought on appeal.

raising the question whether an individual had a peculiar interest that gave him or her standing to vindicate those rights. One of the earliest cases of that kind was *Dalrymple v Colonial Treasurer,*[6] which has been endorsed in numerous subsequent cases,[7] in which it was said that the 'general rule of our law is that no [person] can sue in respect of a wrongful act, unless it constitutes the breach of a duty to him by the wrongdoer, or unless it causes him some damage in law'.[8] Although a broader approach has since been taken in constitutional matters, once more that is in the context of the adjudication of rights.[9] There have also been cases in which a person has sought to intervene in proceedings in which the rights of others are to be determined. There it has been held that a party may intervene in litigation that is not determinative of his or her own rights only if he or she has a 'direct and substantial interest' in the litigation (*Amalgamated Engineering Union v Minister of Labour*[10]) which has been explained as 'the right that is the subject-matter of the litigation.'[11] The present case is quite different. A court that is asked to issue a letter of request is not called upon to pronounce upon or adjudicate any rights at all. It is asked to do no more than place its imprimatur upon a request for inter-state assistance.

[17] It has nonetheless been held, in *Kolbatschenko v King NO,*[12] that the validity of a letter of request might indeed be challenged. In that case the foreign state was requested to take all steps necessary to obtain certain documents and information, if necessary by warrants for search and seizure. It was held that the

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[6] 1910 TS 372.
[7] For example, *Roodepoort-Maraisburg Town Council v Easter Properties (Pty) Ltd* 1933 AD 87 at 101-2; *Cabinet of the Transitional Government for the Territory of South West Africa v Eins* 1988 (3) SA 369 (A) 388B-I; *Jacobs v Waks* 1992 (1) SA 521 (A) 533 J-534E.
[8] Per Innes CJ at 379.
[9] See *Ferreira v Levin NO; Vryenhoek v Powell* NO 1996 (1) SA 984 (CC) para 165; *Minister of Home Affairs v Eisenberg & Associates* 2003 (5) SA 281 (CC) para 28.
[10] 1949 (3) SA 637 (A).
[11] *Henri Viljoen (Pty) Ltd v Awerbach Brothers* 1953 (2) SA 151 (O) 169H. See, too, *United Watch & Diamond Co. (Pty) Ltd v Disa Hotels Ltd* 1972 (4) SA 410 (C) and cases there cited, which are to similar effect.
[12] 2001 (4) SA 336 (C).

applicant had standing to challenge the validity of the letter of request because he was 'closely connected' to the entities whose property was liable to be seized under the warrants that were requested.[13] But what is more important for present purposes is that the court went on to say if that was insufficient to give the applicant standing then 'the fact that the applicant is at risk of being prosecuted is…sufficient to elevate his interest to what is required in that regard…'.[14]

[18] In a decision of the High Court at Pretoria that was delivered shortly before this appeal was heard Van der Merwe J dismissed an application to set aside a letter of request (the applicant in that case was Mr Zuma) on the ground that the applicant had no standing to contest the validity of the letter of request.[15] Referring to the finding in *Kolbatschenko* the learned judge said the following:

'If the court in the *Kolbatschenko* judgment…was of the opinion that the risk of being prosecuted on its own is enough to clothe a person whose affairs [are] to be investigated with locus standi, I find myself in disagreement with that finding.'

(The learned judge also distinguished the decision in *Reuters Group Plc v Viljoen NO* 2001 (2) SACR 519 (C). In my view that case is also at least distinguishable from the case before us and for that reason I have not dealt with it.)

[19] I respectfully associate myself with the views of Van der Merwe J. Underlying the reasoning in *Kolbatschenko* appears to be the assumption that a person who faces the risk of prosecution if a warrant for search and seizure is executed has standing to challenge the validity of the warrant and hence, by parity of reasoning, that he or she also has standing to challenge the validity of a

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[13] At 349B.
[14] At 349E-F.
[15] *Ex parte National Director of Public Prosecutions: In re an Application for the Issuing of a Letter of Request in terms of Section 2(2) of the International Co-operation in Criminal Matters Act, No 75 of 1996* unreported decision dated 14 September 2007 under Case No. 3771/07.

request for the issue of such a warrant. None of the cases that were referred to in *Kolbatschenko* support that reasoning. In all those cases the applicant who challenged the validity of the warrant was threatened with an invasion of his or her rights of privacy and property if the warrant was executed. I do not think that a person who is at risk of prosecution if a warrant for search and seizure is executed has standing to challenge the validity of the warrant for that reason alone. That being so it also cannot afford him or her standing to challenge the validity of a letter requesting that such a warrant be issued and in my view *Kolbatschenko* was incorrectly decided in that respect.

[20] That the documents that are sought in the present case might assist in any prosecution of the appellants that might occur does not seem to me to entitle them to challenge the validity of the letter of request and I see no other grounds that might entitle them to do so. That the appellants were given notice to attend the proceedings and were afforded the opportunity of being heard by the learned judge does not seem to me to take the matter further. It follows that the appellants also have no standing to prosecute an appeal against the decision of the learned judge and on that ground alone the appeal must fail. I do not think the matter warranted the employment of three counsel.

[21] The appeal is dismissed with costs that include the costs of two counsel.

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R.W. NUGENT
JUDGE OF APPEAL

FARLAM JA)
CLOETE JA) CONCUR
PONNAN JA)
MLAMBO JA)